

ORDINANCE NO. 38-12

**AN ORDINANCE REPEALING THE EXISTING CHAPTER 14, ARTICLE IV, DIVISION 5, SECTIONS 14-141 THROUGH 14-166, OF THE FORT SMITH MUNICIPAL CODE AND REPLACING THEM WITH NEW SECTIONS 14-141 THROUGH 14-166 AND TWO NEW SECTIONS 14-167 AND 14-168, REDEFINING AND CLASSIFYING SEXUALLY ORIENTED BUSINESSES; PROVIDING RESTRICTIONS ON THE LOCATION OF SEXUALLY ORIENTED BUSINESSES; PROVIDING FOR THE LICENSING OF SEXUALLY ORIENTED BUSINESSES AND THEIR EMPLOYEES; PROVIDING REGULATIONS CONCERNING THE OPERATION OF SEXUALLY ORIENTED BUSINESSES; AND PROVIDING PENALTIES FOR VIOLATIONS**

It is the finding of the Board of Directors of the City of Fort Smith, Arkansas, that:

1. Sexually oriented businesses require special supervision in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the communities where they locate; and,
2. Sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and, the concern over sexually transmitted diseases is a legitimate health concern of the City of Fort Smith ("the City") that demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and,
3. Licensing is a legitimate means of accountability to ensure that operators and employees of sexually oriented businesses comply with reasonable regulations, and to ensure that operators do not allow their establishments to be used as places of illegal sexual activity or solicitation; and,
4. There is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and,

5. It is recognized that sexually oriented businesses, due to their nature, have serious objectionable operational characteristics and secondary impacts, particularly when they are located in proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and,
6. The Board of Directors wants to prevent these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight; and,
7. It is not the intent of the Board of Directors to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance that addresses the secondary effects of sexually oriented businesses as well as the health problems associated with such businesses; and,
8. It is not the intent of the Board of Directors to condone or legitimize the distribution of obscene materials, and the Board of Directors recognizes that state and federal law prohibits the distribution of obscene materials and expects and encourages state enforcement officials to enforce state and federal obscenity statutes against any such illegal activities in the City of Fort Smith; therefore;

BE IT ORDAINED AND ENACTED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS:

**SECTION 1: CONFLICTING ORDINANCES REPEALED.**

Sections 14-141 through 14-166 of Chapter 14, Article IV, Division 5, of the Fort Smith Municipal Code are hereby repealed, and replaced as set forth below in Sections 14-141 through 14-168. However, neither Ordinance 16-97 nor Ordinance 17-97, nor any ordinance or codification specifically providing restrictions on public nudity and public “specified sexual activities” are repealed.

**SECTION 2:**

Sections 14-141 through 14-166 of Chapter 14, Article IV, Division 5, are repealed and replaced as follows; and two new sections, i.e., Sections 14-167 and 14-168 are added:

#### **SECTION 14-141. Purpose.**

It is the purpose of this division to regulate sexually oriented businesses and related activities to promote the health, safety, morals, and general welfare of the citizens of the City and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of sexually oriented businesses within the City. The provisions of this division have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor the effect of this division to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene materials.

#### **SECTION 14-142. Findings.**

Based on evidence concerning the adverse secondary effects of adult uses on the community presented in reports made to the Board of Directors, and on findings incorporated in the cases of *City of Erie v. Pap's A.M.*, (98-1161, March 29, 2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986); *California v. LaRue*, 409 U.S. 109 (1972); *Iacobucci v. City of Newport, KY*, 479 U.S. 92 (1986); *United States v. O'Brien*, 391 U.S. 367 (1968); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995); and *South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11<sup>th</sup> Cir. 1984), as well as studies conducted in other cities including, but not limited to: Oklahoma City, Oklahoma; Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Cleveland, Ohio; Beaumont, Texas; and Seattle, Washington; and findings reported in the Final Report of the Attorney General's Commission on Pornography (1986), the Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989, State of Minnesota), and statistics obtained from the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, the Board of Directors finds that:

1. Sexually oriented businesses lend themselves to ancillary unlawful and unhealthy activities that are uncontrolled by the operators of the establishments. Further, there is presently no mechanism to make owners of these establishments responsible for the activities that occur on their premises.
2. Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located. *See, e.g.*, studies of the cities of Phoenix, Arizona; Indianapolis, Indiana; and Austin, Texas.
3. Sexual acts, including masturbation, and oral and anal sex, occur at sexually oriented businesses, especially those which provide private or semi-private booths or cubicles for viewing films, videos, or live sex shows. *See, e.g., California v. LaRue*, 409 U.S. 109, 111 (1972); *see also* Final Report of the Attorney General's Commission on Pornography (1986) at 377.
4. Offering and providing such booths and/or cubicles encourages such activities, which creates unhealthy conditions. *see, e.g.*, Final Report of the Attorney General's Commission on Pornography (1986) at 376-77.
5. Persons frequent certain adult theaters, adult arcades, and other sexually oriented businesses, for the purpose of engaging in sex within the premises of such sexually oriented businesses. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698 (1986); *See also* Final Report of the Attorney General's Commission on Pornography (1986) at 376-77.
6. At least fifty communicable diseases may be spread by activities occurring in sexually oriented businesses including, but not limited to: syphilis, gonorrhea, human immunodeficiency virus infection (HIV-AIDS), genital herpes, hepatitis B, Non A, Non B amebiasis, salmonella infections, and shigella infections. *See, e.g.*, Study of Fort Myers, Florida.
7. For the period ending December 1996, the total number of reported cases of AIDS in the United States caused by the immunodeficiency virus (HIV) was 581,429. *See, e.g.*, Statistics of the U. S. Department of Health and Human Services, Centers for Disease Control and Prevention.

8. From 1983 through September 12, 1997, the cumulative number of HIV-positive persons reported in Arkansas was 3,811. Of that number, 2,300 met AIDS case definitions. Since 1983 and to the present, there have been an increasing cumulative number of persons testing positive for HIV antibody test in Arkansas. *See* Arkansas HIV/AIDS Report September 12, 1997.
9. The total number of cases of early (less than one year) syphilis in the United States reported during the ten years period 1985-1995 was 367,796. *See, e.g.,* Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.
10. The number of cases of gonorrhea in the United States reported annually remains at a high level, with a total of 1,256,297 cases reported during the period 1993-1995. *See, e.g.,* Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.
11. The Surgeon General of the United States in his report of October 22, 1986, advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug use, exposure to infected blood and blood components, and from an infected mother to her newborn.
12. According to the best scientific evidence available, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts. *See, e.g.,* Findings of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.
13. Sanitary conditions in some sexually oriented businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the unregulated nature of the activities and the failure of the owners and the operators of the facilities to self-regulate those activities and maintain those facilities. *See, e.g.,* Final Report of the Attorney General's Commission on Pornography (1986) at 377.
14. Numerous studies and reports have determined that bodily fluids, including semen and urine, are found in the areas of sexually oriented businesses where persons view "adult" oriented films. *See, e.g.,* Final Report of the Attorney General's Commission on Pornography (1986) at 377.

15. Nude dancing in adult establishments encourages prostitution, increases sexual assaults, and attracts other criminal activity. *See, e.g., Barnes v. Glen Theatre*, 501 U.S. 560, 583 (1991).
16. Nude dancing in adult establishments increases the likelihood of drug-dealing and drug use. *See, e.g., Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1056 (9th Cir. 1986).
17. The findings noted in paragraphs numbered (1) through (16) raise substantial governmental concerns.
18. Sexually oriented businesses have operational characteristics which should be reasonably regulated in order to protect those substantial governmental concerns.
19. A reasonable licensing procedure is an appropriate mechanism to place the burden of that reasonable regulation on the owners and the operators of the sexually oriented businesses. Further, such a licensing procedure will place an incentive on the operators to see that the sexually oriented business is run in a manner consistent with the health, safety, and welfare of its patrons and employees, as well as the citizens of the City. It is appropriate to require reasonable assurances that the licensee is the actual operator of the sexually oriented business, fully in possession and control of the premises and activities occurring therein.
20. Removal of doors on adult booths and requiring sufficient lighting on the premises with adult booths advances a substantial governmental interest in curbing the illegal and unsanitary sexual activity occurring in adult establishments.
21. The disclosure of certain information by those persons ultimately responsible for the day-to-day operation and maintenance of the sexually oriented business, where such information is substantially related to the significant governmental interest in the operation of such uses, will aid in preventing the spread of sexually transmitted diseases and criminal activity.
22. It is desirable in the prevention of the spread of communicable diseases to obtain a limited amount of information regarding certain employees who may engage in the conduct this ordinance is designed to prevent or who are likely to be witnesses to such activity.

23. The fact that an applicant for a sexually oriented business license has been convicted of a sex-related crime leads to the rational assumption that the applicant may engage in that conduct in contravention of this division.
24. The barring of such individuals from operation or employment in sexually oriented businesses for a period of time for a previous felony conviction serves as a deterrent to and prevents conduct which leads to the transmission of sexually transmitted diseases.
25. The general welfare, health, morals, and safety of the citizens of this City will be promoted by the enactment of this division.

**SECTION 14-143. Definitions.**

ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas."

ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment that, as its principal business purpose, offers for sale or rental, for any form of consideration, any one or more of the following:

1. books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations, whether for viewing off-premises or on-premises, that depict or describe "specified sexual activities" or "specified anatomical areas," or
2. instruments, devices, or paraphernalia that are designed for use in connection with "specified sexual activities."

The determination of the principal business purpose of an establishment is based on the visual inventory or commercial activity of the establishment; provided, there shall be a rebuttable presumption that any commercial establishment which utilizes more than ten percent (10%) of total display area for merchandise of any type described in this definition shall be deemed to be

engaged in the business of an *adult bookstore* or *adult video store* as its principal business purpose.

ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment that presents:

1. persons who appear in a state of nudity or semi-nudity; or
2. live performances that are characterized by the display of any portion of the female breast or any portion of the human buttocks, or which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
3. films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

ADULT MOTEL means a hotel, motel, or similar commercial establishment that:

1. offers accommodation to the public for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions, that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas", and has a sign visible from the public right of way that advertises the availability of this type of adult photographic reproductions; or
2. offers a sleeping room for rent for a period of time that is less than twenty-four (24) hours; or
3. allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than twenty-four (24) hours.

ADULT MOTION PICTURE THEATER means a commercial establishment where, as its principal business purpose, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly presented that are characterized by their emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment that regularly features persons who appear, in person, in a state of nudity, semi-nudity, and/or live performances that are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."



CHIEF OF POLICE means the Chief of Police of the City of Fort Smith and his or her designee.

CLEAR AND CONVINCING means evidence so clear, direct and convincing as to enable the Director to come to a clear conviction as to the allegations sought to be established.

EMPLOYEE means a person who performs any service on the premises of a sexually oriented business on a full time, part time, contract basis, or independent basis, whether or not such person is denominated an employee, independent contractor, agent, or otherwise, and whether or not such person is paid a salary, wage, or other compensation by the operator of said business. "Employee" does not include a person on the premises solely for repair, maintenance, or cleaning of the premises or equipment on the premises, or for the delivery of goods to the premises, nor does "employee" include a person exclusively on the premises as a patron or customer.

ESCORT means a person who, for monetary, or other consideration, agrees or offers to act as a companion, guide, or date for another person, or who, for monetary or other consideration, agrees or offers to model lingerie or to engage in a "specified sexual activity" and/or perform in a state of nudity or semi-nudity for another person off the premises of a sexually oriented business.

ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish, escorts as one of its primary business purposes for a fee, tip, or other consideration.

ESTABLISHMENT means and includes any of the following:

1. the opening or commencement of any sexually oriented business as a new business;
2. the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;
3. the addition of any sexually oriented business to any other existing sexually oriented business; or
4. the relocation of any sexually oriented business.

INTENTIONALLY means that it was the conscious object of the person to engage in the conduct alleged, or to cause the result alleged.

KNOWINGLY means that the person was aware that his or her conduct was of the nature alleged, or that he or she was aware that it was practically certain that his or her conduct would

cause the result alleged, or that he or she consciously disregarded a substantial risk that his or her conduct would cause the result alleged, or that the result alleged would occur.

LICENSED DAY-CARE CENTER means a facility licensed by the State of Arkansas, whether situated within the City or not, that provides care, training, education, custody, treatment, or supervision for more than twelve (12) children under fourteen (14) years of age, where such children are not related by blood, marriage, or adoption to the owner or operator of the facility, for less than twenty-four (24) hours a day, regardless of whether or not the facility is operated for a profit or charges for the services it offers.

LICENSEE means a person in whose name a license has been issued, as well as the individual listed as an applicant on the application for a license.

NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or semi-nudity, or who displays "specified anatomical areas", is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons for consideration, with the exception of those persons and places exempted by Section 14-166 of this division.

NUDITY or a STATE OF NUDITY means the showing of any "specified anatomical area."

OPERATOR means any person in a supervisory capacity over employees and/or contractors, excluding maintenance, delivery, or cleaning personnel, at the sexually oriented business, and any person responsible for security and/or any entrance/exit of the sexually oriented business.

PERSON means an individual, proprietorship, limited partnership, general partnership, corporation, association, limited liability company, or other legal entity.

PREMISES means the real property upon which the sexually oriented business is located, and all appurtenances thereto and buildings thereon, including, but not limited to, the sexually oriented business, the grounds, private walkways, and parking lots and/or parking garages adjacent thereto, under the ownership, control, or supervision of the licensee, as described in the application for a business license pursuant to Section IV of this division;

SEMI-NUDE OR SEMI-NUDITY means the appearance of any part of the female areola or nipple, or the showing of the perineum anal region, in anything less than a fully opaque covering.

SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its principal business purposes, offers for any form of consideration:

1. physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
2. activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity.

SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

SPECIFIED ANATOMICAL AREAS means:

1. the human male genitals in a discernibly turgid state, even if fully and opaquely covered;
2. less than completely and opaquely covered human genitals or anus.

SPECIFIED CRIMINAL ACTIVITY means carnal abuse, sexual abuse, violation of a minor, sexual misconduct, rape, sexual solicitation of a minor, sodomy, prostitution, promotion of prostitution, sale, distribution, or display of harmful material to a minor, sexual performance by a child, possession or distribution of child pornography, and/or patronizing prostitution; in the case of any such conviction, it will constitute specified criminal activity if:

- (a) less than one (1) year has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense; or
- (b) less than five (5) years have elapsed since the date of conviction or the date of release from confinement, whichever is the later date, if the conviction is of a felony offense.

The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant, with the exception of a *de novo* appeal from District Court to Circuit Court. In the case of a *de novo* appeal from District Court to Circuit Court, a disqualification is not effective until such time as there is a conviction in Circuit Court. Should a conviction be reversed on appeal, or in the case of a *de novo* appeal from District Court to Circuit Court, should the Circuit Court fail to convict, then there is no "conviction" for purposes of this division.

SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

1. Actual or simulated sexual intercourse; oral copulation; anal intercourse; oral-anal copulation; bestiality; direct physical stimulation or fondling of unclothed genitals, pubic region, buttock, or female breast; flagellation or torture in a sexual relationship; and any of the following sexually oriented acts or conduct: anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, sodomy, zooerasty;
2. Human genitals in the state of sexual stimulation, arousal, or tumescence;
3. Use or acts of human or animal ejaculation, sexual intercourse, sodomy, oral copulation, coitus, or masturbation;
4. Fondling or touching of human genitals, pubic regions or pubic hair, buttocks, female breasts;
5. Situations involving persons, any of whom are nude, clad in undergarments, or in sexually revealing costumes, who are engaged in activities involving the flagellation, torture, fettering, binding, or other physical restraint of any such person;
6. Erotic or lewd touching, fondling, or other sexually oriented contact with an animal by a human being;
7. Human excretion, urination, menstruation, vaginal or anal irrigation; or
8. Any combination of subsections (1) through (7) of this definition.

SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor areas occupied by the business by more than twenty-five (25%) percent, as the floor areas exist on the effective date of this ordinance.

TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

1. the sale, lease, or sublease of the business;
2. the transfer of securities that form a controlling interest in the business, whether by sale, exchange, or similar means; or
3. the establishment of a trust, gift, or other similar legal device that transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

**SECTION 14-144. Classification.**

Sexually oriented businesses are classified as follows:

1. adult arcades;
2. adult bookstores or adult video stores;
3. adult cabarets;
4. adult motels;
5. adult motion picture theaters;
6. adult theaters;
7. escort agencies;
8. nude model studios; and
9. sexual encounter centers.

**SECTION 14-145. License Required.**

(A) It shall be unlawful:

1. For any person to operate a sexually oriented business without a valid sexually oriented business license issued by the Chief of Police pursuant to this division;
2. For any person who operates a sexually oriented business to employ a person to work and/or perform services on the premises of the sexually oriented business, if such employee is not in possession of a valid sexually oriented business employee license issued to such employee by the Chief of Police pursuant to this division;
3. For any person to obtain employment with a sexually oriented business if such person is not in possession of a valid sexually oriented business employee license issued to such person by the Chief of Police pursuant to this division.
4. It shall be a defense to subsections (2) and (3) of this Section if the employment is of limited duration and for the sole purpose of repair, maintenance and/or cleaning of machinery, equipment, or the premises.
5. Any person convicted of the violation of any provision within this subsection shall be subject to the general penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

(B) An application for a sexually oriented business license must be made on a form provided by the City. Except for a sexually oriented business lawfully operating on the

date this division is enacted, the application must be accompanied by a sketch or a diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared, but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Prior to issuance of a license, the premises must be inspected by the fire department and code enforcement department.

(C) An application for a sexually oriented business employee license must be made on a form provided by the City.

(D) All applicants for a license must be qualified according to the provisions of this division. The application may request, and the applicant shall provide, such information as to enable the City to determine whether the applicant meets the qualifications established under this division. The applicant has an affirmative duty to supplement an application with new information received subsequent to the date the application was deemed completed.

(E) If a person who wishes to own or operate a sexually oriented business is an individual, he or she must sign the application for a business license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, an authorized representative of the partnership, corporation, or limited liability company must sign the application for a business license as applicant.

(F) Applications for a business license, whether original or a renewal, must be made to the Chief of Police. Applications must be submitted to the Office of the Chief of Police during regular working hours. Application forms shall be supplied by the Chief of Police, and shall only request the following information:

1. The name, street address, and mailing address, if different, of the applicant(s);
2. A recent photograph of the individual or representative submitting the application form;
3. The applicant's driver's license number, Social Security number, and/or his/her state or federally issued tax identification number;

4. The name under which the establishment is to be operated and a general description of the services to be provided; if the applicant intends to operate the sexually oriented business under a name other than that of the applicant, he or she must state the sexually oriented business' fictitious name;
5. Whether the applicant has been convicted, or is awaiting trial on pending charges, of a "specified criminal activity" as defined in Section 14-143, and, if so, the "specified criminal activity" involved, the date, place, and jurisdiction of each;
6. Whether the applicant has had a previous license under this division or other similar sexually oriented business ordinance from another city, county, or state or political subdivision denied, suspended, or revoked, including the name and location of the sexually oriented business for which the business license was denied, suspended, or revoked, as well as the date of the denial, suspension, or revocation, and whether the applicant is, or has been, a partner in a partnership or an officer, director, or principal stockholder of a corporation, or a member of a limited liability company that is, or was, licensed under a sexually oriented business ordinance whose business license has previously been denied, suspended, or revoked, including the name and location of the sexually oriented business for which the business license was denied, suspended, or revoked, as well as the date of denial, suspension, or revocation;
7. Whether the applicant holds any other licenses under this division or other similar sexually oriented business ordinance from another city or county in this or any other state and, if so, the names and locations of such other licensed businesses;
8. The single classification of license, as found in Section 14-144, for which the applicant is filing;
9. The telephone number of the establishment;
10. The address, and legal description of the tract of land on which the establishment is to be located;

11. If the establishment is in operation, the date on which the owner(s) acquired the establishment for which the business license is sought, and the date on which the establishment began operations as a sexually oriented business at the location for which the business license is sought;
12. If the establishment is not in operation, the expected startup date (which shall be expressed in number of days from the date of issuance of the business license). If the expected startup date is to be more than ten (10) days following the date of issuance of the business license, then a detailed explanation of the construction, repair, or remodeling work, or other cause of the expected delay, and a statement of the owner's time schedule and plan for accomplishing the same;
13. If an applicant wishes to operate a sexually oriented business, other than an adult motel, which shall exhibit on the premises, in a viewing room or booth of less than one hundred fifty (150) square feet of floor space, films, video cassettes, or other video reproductions, which depict "specified sexual activities" or "specified anatomical areas", then the applicant shall comply with the application requirements set forth in Section 14-160.

(G) Each application for a business license shall be accompanied by the following:

1. Payment of the application fee in full;
2. If the establishment is an Arkansas corporation, limited liability company, or limited partnership, a certificate of good standing issued by the Office of the Secretary of State of Arkansas;
3. If the establishment is a foreign corporation, a certified copy of the certificate of authority to transact business in this state;
4. Except for a sexually oriented business lawfully operating on the date this division is enacted, a current certificate and straight-line drawing prepared within thirty (30) days prior to application by a registered land surveyor depicting the property lines and the structures containing any existing sexually oriented businesses within 1,000 feet of the following types of property: child care facility, playground, public library, recreational area or facility, walking trail, the property lines of any established church or



other place of public worship; public or private elementary, secondary or post-secondary school; public park; hospital; licensed day care center; and entertainment business that is oriented primarily towards children within 1,000 feet of the property to be certified; and, the property lines of any established residential district within 1,000 feet of the property to be certified. For purposes of this Section, a use shall be considered existing or established if it is in existence at the time an application is submitted.

5. Any of items (2) through (4) shall not be required for a renewal application if the sexually oriented business was lawfully operating at the time this division was enacted or the applicant states that the documents previously furnished the Chief of Police with the original application or previous renewals thereof remain correct and current.

(H) Applications for an employee license to work and/or perform services in a sexually oriented business, whether original or renewal, must be made to the Chief of Police by the person or a designated representative of the person to whom the employee license shall issue, except as otherwise provided in this division. Applications transmitted by facsimile will be accepted for this purpose. Each application for an employee license shall be accompanied by proof of payment of the application fee in full. A photocopy of the check or money order will be accepted for this purpose if transmitting the application by facsimile, so long as payment is actually received within five (5) working days. Application forms shall be supplied by the Chief of Police. Applications must be submitted to the Office of the Chief of Police. Each applicant shall be required to give only the following information on the application form:

1. The applicant's given name, and any other names by which the applicant is or has been known, including "stage" names and/or aliases;
2. Age, and date and place of birth;
3. Height, weight, hair color, and eye color;
4. Present residence address and telephone number;
5. Present business address and telephone number;
6. Driver's license, or other state-issued identification card information, to include number, issuing state and expiration date;

7. Social Security number; and
8. Proof that the individual is at least eighteen (18) years old.

(I) Attached to the application form for an employee license to work and/or perform services in a sexually oriented business shall be the following:

1. A color photograph of the applicant clearly showing the applicant's face. If application is made by facsimile, the photograph does not have to be a color photograph, but the color photograph shall be submitted within five (5) days.
2. A statement whether the applicant has been convicted of a "specified criminal activity" as defined in Section 14-143, and, if so, the "specified criminal activity" involved, the date, place, and jurisdiction of each.

(J) Every application for a license shall contain a statement under oath that the applicant has personal knowledge of the information contained in the application, that the information contained therein is true and correct, and that the applicant is aware of the requirements of this division.

(K) A separate application and business license shall be required for each sexually oriented business classification as set forth in Section 14-144.

(L) The fact that a person possesses other types of state or City permits and/or licenses does not exempt him or her from the requirement of obtaining a sexually oriented business or employee license.

#### **SECTION 14-146. Issuance of License.**

(A) Upon the filing of an application for a sexually oriented business employee license, the Chief of Police shall issue a temporary license to said applicant. In the case of an application filed by facsimile transmission, proof of the facsimile transmittal shall suffice as a temporary license until the actual temporary license is issued. The application shall then be referred to the appropriate City departments for investigation to be made on the information contained in the application. The application process shall be completed within thirty (30) days from the date of the completed application. After the investigation, the Chief of Police shall issue an employee license, unless it is determined by a preponderance of the evidence that one or more of the following findings is true:

1. The applicant and/or the applicant's representative has intentionally failed to provide the information reasonably necessary for issuance of the license or has intentionally answered falsely a material question or request for information on the application form;
2. The applicant is under the age of eighteen (18) years;
3. The applicant has been convicted of a "specified criminal activity" as defined in Section 14-143;
4. The sexually oriented business employee license is to be used for employment in a business prohibited by local or state law, statute, rule, or regulation, or prohibited by a particular provision of this division; or
5. The applicant has had a sexually oriented business employee license revoked by the City within one (1) year of the date of the current application.

In the event that the Chief of Police determines preliminarily that an applicant is not eligible for a sexually oriented business employee license, the applicant shall be given notice in writing as set forth in Section 14-167 by certified mail, return receipt requested, of each of the above reasons which support such preliminary denial within thirty (30) days of the receipt of the completed application by the Chief of Police. The applicant shall have ten (10) days after receipt of the notice to make modifications necessary for purposes of complying with this section and to reapply for a sexually oriented business employee license. After ten (10) days, the denial will become final unless there has been modification and reapplication made by the applicant. However, if additional time is shown by the applicant to be reasonably necessary to comply with this section, the Chief of Police may grant an extension, not to exceed an additional thirty (30) days. Upon receipt of modifications and reapplication by the Chief of Police, the Chief of Police shall issue an employee license, unless it is determined by a preponderance of the evidence that the modifications fail to remedy the original basis for the preliminary denial by the Chief of Police. If such determination is made by the Chief of Police, the Chief of Police again must give notice in writing as set forth in Section 14-167 by certified mail, return receipt requested, to the applicant of the reasons for the denial, and said denial is final and appealable.

A final denial, suspension, or revocation by the Chief of Police of a license issued pursuant to this Section shall be subject to the same rights as those set forth in subsection (I) of this Section.

(B) A license issued pursuant to subsection (A) of this Section, if granted, shall state on its face the name of the person to whom it is granted, the expiration date, and the address of the sexually oriented business. The employee shall keep the license available for inspection at the establishment upon lawful request at all times while engaged in employment or performing services on the sexually oriented business premises.

(C) A license issued pursuant to subsection (A) of this Section shall be subject to annual renewal upon the written application of the applicant and a written finding determined by a preponderance of the evidence by the Chief of Police that the applicant has not been convicted of any "specified criminal activity" as defined in this ordinance, or committed any act during the existence of the previous license, which would be grounds to deny the initial license application. The decision whether to renew an employee license shall be made within thirty (30) days of the completed application. The renewal of a license shall be subject to the fee as set forth in Section 14-147. The non-renewal of a license shall be subject to the same notice, modification, and reapplication, and appeal rights as set forth elsewhere in this Section.

(D) If application is made for a sexually oriented business license, the Chief of Police shall approve or deny issuance of the license within forty-five (45) days of receipt of the completed application. The Chief of Police shall issue a license to an applicant unless it is determined by a preponderance of the evidence that one or more of the following findings is true:

1. An applicant has intentionally failed to provide the information reasonably necessary for issuance of the license or has intentionally answered falsely a material question or request for information on the application form;
2. An applicant is under the age of eighteen (18) years;
3. An applicant is overdue in payment to the City of taxes, fees, fines, or penalties assessed against or imposed upon him/her in relation to any business. An applicant denied a license on this basis will have all rights

and remedies set forth in Section 14-146 (H) to attempt to remedy any such deficiency and reapply for a license;

4. An applicant has been convicted of a "specified criminal activity" as defined in Section 14-143;
5. Except for a sexually oriented business lawfully operating on the date this division is enacted, the premises to be used for the sexually oriented business do not comply with the location restrictions set forth in Section 14-155;
6. The premises to be used for the sexually oriented business have not been approved by the fire department and the code enforcement department as being in compliance with applicable laws and ordinances;
7. An applicant has been finally denied, after opportunity to exercise due process rights, a license by the City to operate a sexually oriented business for any of the above listed reasons within the preceding twelve (12) months, or his or her license to operate a sexually oriented business has been finally revoked, after opportunity to exercise due process rights, for any of the reasons listed in Sections 14-151 and 14-152 within the preceding twelve (12) months.

(E) A license issued pursuant to subsection (D) of this Section, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, the address of the sexually oriented business, and the Section 14-144 classification for which the license is issued. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.

(F) The fire department and code enforcement department shall complete their certification that the premises are in compliance or not in compliance within twenty (20) days of receipt of the completed application by the Chief of Police. The certification shall be promptly presented to the Chief of Police.

(G) A sexually oriented business license shall issue for only one classification, as set forth in Section 14-144.

(H) In the event that the Chief of Police determines preliminarily that an applicant is not eligible for a sexually oriented business license, the applicant shall be given notice in

writing by certified mail, return receipt requested, of each of the above reasons which support such preliminary denial within forty-five (45) days of the receipt of the completed application by the Chief of Police. The applicant shall have ten (10) days after receipt of the notice to make modifications necessary for purposes of complying with this section and to reapply for a sexually oriented business license. After ten (10) days, the denial will become final unless such required modifications and reapplication are made by the applicant. However, if additional time is shown by the applicant to be reasonably necessary to comply with this section, the Chief of Police may grant an extension, not to exceed an additional thirty (30) days. Upon receipt of modifications and reapplication, the Chief of Police shall issue a license, unless it is determined by a preponderance of the evidence that the modifications fail to remedy the original basis for the preliminary denial. If such determination is made, the Chief of Police again must give notice in writing by certified mail, return receipt requested, to the applicant of the reasons for the denial, and said denial is final and appealable.

(I) An applicant may appeal the decision regarding a final denial to the Board of Directors by filing a written notice of appeal with the City Clerk within fifteen (15) days after service of notice upon the applicant of the denial decision. The notice of appeal shall be accompanied by a memorandum or other writing setting out fully the grounds for the appeal and all arguments in support thereof. The Chief of Police may, within fifteen (15) days of service upon him or her of the applicant's memorandum, submit a memorandum in response to the memorandum filed by the applicant on appeal to the Board of Directors. After reviewing such memoranda, as well as the written decision of the Chief of Police, if any, and exhibits submitted to him or her, the Board of Directors shall vote either to uphold or overrule the decision to deny. Such vote shall be taken within twenty-one (21) calendar days after the date on which the City Clerk receives the notice of appeal. Judicial review of a denial by the Chief of Police and Board of Directors may be sought pursuant to Section 14-153 of this division. During the pendency of any appeal, the parties shall maintain the status quo, unless in the interim, a court issues an injunction pursuant to Section 14-168.

(J) A license issued pursuant to subsection (D) of this Section shall be subject to annual renewal upon the written application of the applicant and a written finding determined by

a preponderance of the evidence by the Chief of Police that the applicant has not been convicted of any "specified criminal activity" as defined in this division, or committed any act during the existence of the previous license which would be grounds to deny the initial license application. The decision whether to renew a business license shall be made within forty-five (45) days of the completed application. The renewal of a license shall be subject to the fee as set forth in Section 14-147.

Any determination by the Chief of Police with respect to the renewal of a sexually oriented business license must conform to the duties and rights set forth in Section 14-146 (H). Furthermore, the applicant for a renewal of a license shall have the same rights with respect to renewal as those set forth in Section 14-146 (I). During the pendency of any appeal, the parties shall maintain the status quo, unless in the interim, a court issues an injunction pursuant to Section 14-168.

#### **SECTION 14-147. Fees.**

The annual fee for a sexually oriented business license, whether new or a renewal, is Two Hundred Fifty (\$250.00) Dollars. The annual fee for a sexually oriented business employee license, whether new or a renewal,, is Twenty-five (\$25.00) dollars. These fees are to be used to pay for the cost of the administration and enforcement of this division.

#### **SECTION 14-148. Inspection.**

(A) An applicant or licensee shall allow representatives of the police department, fire department, code enforcement department, or other City or state departments or agencies, to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is open for business.

(B) No person who operates a sexually oriented business, nor his agents or employees, shall refuse to promptly permit such lawful inspection of the premises.

(C) A person convicted of violation of this Section shall be subject to the penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

#### **SECTION 14-149. Expiration of License.**

(A) Each business license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 14-145, and by payment of the fee set forth in Section 14-147. Upon filing of an application for renewal of a business license, the existing business license shall remain in effect until a final determination on the application for renewal is made as set forth in Section 14-146 (J).

(B) Each sexually oriented business employee license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 14-145, and by payment of the fee set forth in Section 14-147. Upon filing an application for renewal of a business employee license, the existing license shall remain in effect until a final determination on the application for renewal is made as set forth in Section 14-146 (J).

(C) The applicant shall not be issued a license for one year from the date of a final denial if such denial is not appealed, or for one year from the date of a final determination if the denial is appealed and is upheld.

Any determination with respect to the renewal of a license must conform to the duties and rights set forth in Section 14-146 of this division.

#### **SECTION 14-150. Assessment of Administrative Penalty.**

The Chief of Police shall assess an administrative penalty to a business licensee and/or any person who is an operator as the case may be, in the amount of Two Hundred Fifty Dollars (\$250.00) for each offense where he determines by clear and convincing evidence that:

1. A business licensee or an individual operator knew or should have known of the possession, use, or sale of controlled substances in the establishment;
2. A business licensee or an individual operator knew or should have known of the sale, use, or consumption of alcoholic beverages in the establishment;
3. A business licensee or an individual operator knew or should have known of nudity or "specified sexual activities" occurring in the establishment; or



4. A business licensee or an individual operator knew or should have known of a person under eighteen (18) years of age entering the establishment.

It is not the intent of this division for the Chief of Police to impose an administrative penalty upon a business licensee for the occurrence of incidents outside the actual knowledge of the business licensee.

If the business licensee or the same individual operator of a sexually oriented business is assessed an administrative penalty (and such administrative penalty is upheld after judicial review pursuant to Section 14-153) for the same offense three times or more, and the dates of these offenses have occurred within a twelve (12) month period, the business licensee or the individual operator, as the case may be, shall be suspended in accordance with Section 14-151. For purposes of Sections 14-150, 14-151, and 14-152, multiple incidents of the same nature, which would constitute a violation of any of the provisions set forth in (1) through (4) above, shall be considered as only one (1) offense if they occur within the same business day.

In the event that the Chief of Police determines that one of the above described offenses has occurred and determines that the assessment of an administrative penalty against the business licensee or an individual operator is appropriate, the Chief of Police must give notice in writing by certified mail, return receipt requested, of each of the above reasons which support the assessment of a penalty, including the date or dates when each such incident occurred. Such notice shall be given within thirty (30) days of the incident or incidences for which the business is being cited, or within thirty (30) days of the conclusion of the Chief's investigation, whichever is earlier.

A licensee may appeal the decision of the Chief of Police regarding the assessment of an administrative penalty to the Board of Directors by filing a written notice of appeal with the City Clerk within fifteen (15) days after service of notice upon the licensee of the assessment decision. The notice of appeal shall be accompanied by a memorandum or other writing setting out fully the grounds for such appeal and all arguments in support thereof. The Chief of Police may, within fifteen (15) days of service upon him or her of the licensee's memorandum, submit a memorandum in response to the memorandum filed by the licensee on appeal to the Board of Directors. After reviewing such memoranda, as well as the Chief's written decision, if any, and exhibits submitted to the Chief of Police, the Board of Directors shall vote either to uphold or

overrule the decision. Such a vote shall be taken within twenty-one (21) calendar days after the date on which the City Clerk receives the notice of appeal. Judicial review of an administrative penalty by the Chief of Police and Board of Directors may be made pursuant to Section 14-153.

Furthermore, judicial review of a suspension affirmed by the Board of Directors may be made pursuant to Section 14-153. During the pendency of the appeal, the status quo shall be maintained such that the licensee shall continue to be allowed to operate its business pursuant to its license and pursuant to this division. This section in no way is intended to replace or substitute for criminal penalties which may apply under local, state, or federal law for any of the activities enumerated above.

#### **SECTION 14-151. Suspension.**

The Chief of Police shall suspend the license of a business licensee and/or any person who is an operator, as the case may be, for a period not to exceed thirty (30) days if he or she determines by clear and convincing evidence that:

1. A business licensee intentionally answered falsely a material question or request for information during the application process;
2. A business licensee or an individual operator is convicted of a "specified criminal activity" on a charge that was pending prior to the issuance of the license;
3. A business licensee or an individual operator has, with knowledge, permitted prostitution on the premises;
4. A business licensee or an individual operator has been fined for the same offense, of those offenses listed in Section 14-150, three times or more, and the dates of those offenses occurred within a twelve (12) month period; or
5. A business licensee or an individual operator is overdue in payment to the City of taxes, fees, fines, or penalties assessed against or imposed upon him or her in relation to any business. A licensee found in violation in this regard will have all rights and remedies set forth in Section 14-146 (H) to attempt to remedy any such deficiency before any suspension of the license may occur.

If a business license is suspended by the Chief of Police more than one time in a twelve (12) month period, the license shall be revoked in accordance with Section 14-152.

In the event that the Chief of Police determines that one of the above described incidents has occurred, and determines that suspension of the business license is appropriate, he or she must give notice in writing by certified mail, return receipt requested, of each of the above reasons which support the suspension of the business license, including the date or dates when each such incident occurred. Such notice shall be given within thirty (30) days of the incident or incidences for which the business is being cited, or within thirty (30) days of the conclusion of the investigation, whichever is earlier.

A licensee may appeal a decision regarding a suspension to the Board of Directors by filing a written notice of appeal with the City Clerk within fifteen (15) days after service of notice upon the licensee of the decision of the Chief of Police. The notice of appeal shall be accompanied by a memorandum or other writing setting out fully the grounds for such appeal and all arguments in support thereof. The Chief of Police may, within fifteen (15) days of service upon him of the licensee's memorandum, submit a memorandum in response to the memorandum filed by the licensee on appeal to the Board of Directors. After reviewing such memoranda, as well as the written decision of the Chief of Police, if any, and exhibits submitted to the Chief, the Board of Directors shall vote either to uphold or overrule the suspension decision. Such a vote shall be taken within twenty-one (21) calendar days after the date on which the City Clerk receives the notice of appeal.

Judicial review of a suspension by the Board of Directors may be made pursuant to Section 14-153. During the pendency of the appeal, the status quo shall be maintained such that the licensee shall continue to be allowed to operate its business pursuant to its license and pursuant to this division.

#### **SECTION 14-152. Revocation.**

The Chief of Police shall revoke a license for one (1) year from the date the revocation becomes effective if he or she determines that any of the grounds for suspension set forth in Section 14-151 is proven by clear and convincing evidence, and that the license has already been

suspended within the preceding twelve (12) months; or that the business operated while its license was suspended.

A licensee may appeal a decision regarding a revocation to the Board of Directors by filing a written notice of appeal with the City Clerk within fifteen (15) days after service of notice upon the licensee of the revocation decision. The notice of appeal shall be accompanied by a memorandum or other writing setting out fully the grounds for such appeal and all arguments in support thereof. The Chief of Police may, within fifteen (15) days of service upon him or her of the licensee's memorandum, submit a memorandum in response to the memorandum filed by the licensee on appeal to the Board of Directors. After reviewing such memoranda, as well as the Chief's written decision, if any, and exhibits submitted to the Chief, the Board of Directors shall vote either to uphold or overrule the revocation decision. Such a vote shall be taken within twenty-one (21) calendar days after the date on which the City Clerk receives the notice of appeal.

Judicial review of a revocation by the Board of Directors may be made pursuant to Section 14-153. During the pendency of the appeal, the status quo shall be maintained such that the licensee shall continue to be allowed to operate its business pursuant to its license and pursuant to this division.

#### **SECTION 14-153. Judicial Review.**

After denial of an initial or renewal application by the Chief of Police and by the Board of Directors, or upon an assessment of an administrative penalty, suspension, or revocation by the Chief of Police and by the Board of Directors, the applicant or licensee may seek judicial review in any court of competent jurisdiction. The rules and procedures for such appeal are modeled on Rule 9 of the Arkansas Inferior Court Rules. Those Rules provide as follows:

1. Time for taking appeal. All appeals from the Board of Directors to a court of competent jurisdiction must be filed in the Office of the Clerk of the particular court having jurisdiction of the appeal within thirty (30) days from the date of the vote by the Board of Directors.
2. How taken. An appeal from the Board of Directors to a court of competent jurisdiction shall be taken by filing the record of the findings and proceedings of the Chief of Police and the Board of Directors, to the

extent such a record is available. It shall be the duty of the City Clerk to prepare and certify such record when requested by the appellant, and upon payment of any fees authorized by law therefore. The appellant shall have the responsibility of filing such record in the Office of the Clerk of the Court of competent jurisdiction.

3. No record available. When the City Clerk neglects or refuses to prepare and certify a record for filing in a court of competent jurisdiction, the person desiring an appeal may perfect the appeal on or before the 30th day from the date of the vote by the Board of Directors by filing an Affidavit in the Office of the Clerk of the court of competent jurisdiction showing that he or she has requested the City Clerk to prepare and certify the records for purposes of appeal, and that the City Clerk has neglected to prepare and certify such records for purposes of appeal. A copy of such Affidavit shall be promptly served upon the City Clerk and upon the Chief of Police.

#### **SECTION 14-154. No Transfer of License.**

A licensee shall not transfer his or her license to any person who has not obtained a license, nor shall a business licensee operate a sexually oriented business under the authority of a sexually oriented business license at any place other than the address designated in the application. This section is not intended to prevent a business licensee from being allowed to sell, assign, or transfer ownership or control of his or her business to another person already possessing a valid sexually oriented business license. It is intended only to prevent the sale, assignment, or transfer of ownership or control of a license by the licensee, or of the business to a non-licensee.

#### **SECTION 14-155. Location Restrictions.**

Sexually oriented businesses not already lawfully operating on the effective date of this division shall be permitted only in zoning districts Commercial 2, Commercial 3-P, Commercial 4-P, Commercial 5, Commercial 5-SPL(S), and Commercial 6, subject to the following:

1. The sexually oriented business may not be operated within:
  - a. 1,000 feet of a church or other place of public worship;
  - b. 1,000 feet of a public or private elementary, secondary, or post-secondary school;
  - c. 1,000 feet of a public park;
  - d. 1,000 feet of a hospital;
  - e. 1,000 feet of a licensed day-care center;
  - f. 1,000 feet of an entertainment business that is oriented primarily towards children;
  - g. 1,000 feet of a residence;
  - h. 1,000 feet of another sexually oriented business;
  - i. 1,000 feet of a playground;
  - j. 1,000 feet of a public library;
  - k. 1,000 feet of a recreational area or facility;
  - l. 1,000 feet of a walking trail; or
  - m. 1,000 feet of a child care facility.

These provisions, 1(a) through 1(m), shall not apply to a sexually oriented business already lawfully operating on the effective date of this division if a church or other place of worship, or a public or private elementary, secondary, or post-secondary school, or any public park, or any hospital, or any licensed day-care center, or any entertainment business that is oriented primarily towards children, or any residence, or a playground, or a public library, or a recreational area or facility, or a walking trail, or a child care facility is subsequently established within 1,000 feet.

2. Any legally established sexually oriented business, which would otherwise become non-conforming because of a zone change or the establishment of another use, may continue to operate in the same location if such zone

another use, may continue to operate in the same location if such zone change or new use is not caused by or is not the fault of the sexually oriented business.

3. A sexually oriented business may not be operated in the same building, structure, or portion thereof, containing another sexually oriented business classified pursuant to Section 14-144.
4. For the purpose of this division, measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest property of the premises where a sexually oriented business is conducted, to the nearest property line of a church or other place of public worship; public or private elementary, secondary or post-secondary school; public park; hospital; licensed day care center; entertainment business that is oriented primarily towards children; boundary of any residential district; other sexually oriented business; playground; public library; recreational area or facility; and a walking trail or child care facility.

#### **SECTION 14-156. Additional Regulations for Adult Motels.**

A) Evidence that a sleeping room in a hotel, motel, or a similar commercial enterprise has been rented and vacated two or more times in a period of time that is less than ten (10) hours creates a rebuttable presumption that the enterprise is an adult motel as that term is defined in this division.

(B) A person in control of an adult motel must have a sexually oriented business license or be subject to penalties as set forth below.

(C) For purposes of subsection (B) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

(D) Any person convicted of the violation of subsection (B) of this Section shall be subject to the general penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

#### **SECTION 14-157. Additional Regulations for Escort Agencies.**

(A) An escort agency shall not employ any person under the age of eighteen (18) years.

(B) A person shall not act as an escort or agree to act as an escort for any person under the age of eighteen (18) years.

(C) A person convicted of a violation of any provision of this Section shall be subject to the general penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

**SECTION 14-158. Additional Regulations For Nude Model Studios.**

(A) A nude model studio shall not employ any person under the age of eighteen (18) years.

(B) A person under the age of eighteen (18) years shall not appear semi-nude or in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under eighteen (18) years was in a restroom not open to the public view or visible by any other person.

(C) A person shall not appear in a state of nudity, or with knowledge, allow another to appear in a state of nudity, in an area of a nude model studio premises which can be viewed from the public right of way.

(D) A nude model studio shall not place or permit a bed or mattress in any room on the premises.

(E) A person convicted of the violation of any provision of this Section shall be subject to the penalties as set out in Section 1-9 of the Fort Smith Municipal Code.



**SECTION 14-159. Additional Regulations Concerning Public Nudity.**

(A) A person shall not appear in person in a state of nudity or semi-nudity in a sexually oriented business.

(B) A person shall not engage in any "specified sexual activity" in a sexually oriented business.

(C) A person convicted of the violation of any provision of this Section shall be subject to the penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

**SECTION 14-160. Regulations Pertaining to Exhibition of Sexually Explicit Films and Videos.**

(A) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than one hundred (100) square feet of floor space, a film, video cassette, or other video reproduction that depicts "specified sexual activities" or "specified anatomical areas," shall comply with the following requirements:

1. Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of all manager's stations, viewing rooms, restrooms, and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed thirty-two (32) square feet of floor area. The diagram shall also designate the place at which the business license will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram should be oriented to the north, or to some designated street or object, and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six (6") inches. The Chief of Police may waive the foregoing diagram for renewal applications if the applicant adopts a

diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

2. The application shall be sworn to be true and correct by the applicant.
3. No alteration in the configuration or location of a manager's station may be made without the prior approval of the Chief of Police.
4. It is the duty of the owner(s) and operator(s) of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.
5. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of the entire area of the premises, including the interior of each viewing room, to which any patron is permitted access for any purpose, excluding restrooms. Restrooms may not contain video reproduction equipment and/or two way mirrors. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of the entire area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.
6. It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that the view area specified in subsection (5) of this Section remains unobstructed by any doors, walls, merchandise, display racks, curtains, or other materials, at all times and to ensure that no patron is permitted access to any area of the premises that has been designated as an area in which patrons will not be permitted, as designated in the application filed pursuant to subsection (1) of this Section.
7. The interior of each booth shall be sufficiently illuminated so that the inside of the booth is visible from the manager's station as set forth in subsection (5) of this section.

8. The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five (5.0) foot-candles as measured at the floor level.
9. It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that the illumination described above is maintained at all times that any patron is present in the premises.
10. There shall be no glass of any kind between booths, and booths shall not be designed, constructed, or configured in such a manner that the interior of any booth may be visible or made to be visible from any other booth.
11. No licensee or operator shall knowingly allow an opening of any kind to exist between viewing rooms or booths.
12. The operator of the sexually oriented business shall, during each business day, inspect the walls between the viewing booths to determine if any openings or holes exist.
13. The operator of the sexually oriented business shall cause all floor coverings in viewing booths to be nonporous, easily cleanable surfaces, with no rugs or carpeting.
14. The operator of the sexually oriented business shall cause all wall surfaces and ceiling surfaces in viewing booths to be constructed of, or permanently covered by, nonporous, easily cleanable material. No wood, plywood, composition board or other porous material shall be used within forty-eight (48") inches of the floor.
15. The operator of the sexually oriented business shall ensure that premises are clean and sanitary at all times. All walls, ceilings, floors, viewing booths, restrooms, and all physical facilities in each adult business shall be thoroughly cleaned at least once each day the sexually oriented business is in operation.
16. No viewing room may be occupied by more than one person at any time.

17. It shall be the duty of the operator, and of any agents or employees present on the premises, to ensure that no “specified sexual activities,” as defined in Section 14-143, occur in or on the licensed premises.

(B) A person having a duty under Subsection (A) (1) through (A) (17) of this Section who is convicted of failing, with knowledge, to fulfill that duty, shall be subject to the general penalties as set out in section 1-9 of the Fort Smith Municipal Code.

**SECTION 14-161. Exterior Portions of and Signage for Sexually Oriented Businesses.**

(A) No owner or operator of a sexually oriented business shall allow the merchandise or activities of the establishment to be visible from a point outside the establishment.

(B) No owner or operator of a sexually oriented business shall allow the exterior portion of the sexually oriented business to have any photographs of any person in a state of nudity or engaging in any “specified sexual activity,” nor shall such owner or operator allow the exterior portion of the sexually oriented business to have any pictorial or other representations of any kind of any person in a state of nudity or engaging in any “specified sexual activity.”

(C) Notwithstanding any other City ordinance, code, or regulation to the contrary, the operator of any sexually oriented business or any other person shall not erect, construct, or maintain any sign for the sexually oriented business other than the one (1) primary sign and one (1) secondary sign, as provided herein.

(D) Primary signs shall have no more than two (2) display surfaces. Each such display surface shall:

1. conform with the City's sign code;
2. be a flat plane, rectangular in shape; and
3. not exceed seventy-five (75) square feet in area.

(E) Primary signs shall contain no photographs, and shall contain no pictorial or other representations of any kind of any person in a state of nudity or engaging in any “specified sexual activity.”

(F) Secondary signs shall have no more than one (1) display surface. Such display surface shall:

1. conform with the City's sign code;

2. be a flat plane, rectangular in shape;
3. not exceed twenty (20) square feet in area;
4. not exceed five (5) feet in height and four (4) feet in width; and
5. be affixed or attached to any wall or door of the enterprise.

(G) The provisions of subsection (E) above shall also apply to secondary signs.

(H) A person convicted of the violation of any provision of this Section shall be subject to the penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

**SECTION 14-162. Sale, Use or Consumption of Alcoholic Beverages Prohibited.**

(A) The sale, use, or consumption of alcoholic beverages on the premises of a sexually oriented business is prohibited.

(B) A person convicted of the violation of this Section shall be subject to the penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

**SECTION 14-163. Persons Younger than Eighteen (18) Years Prohibited from Entry; Attendant Required.**

(A) No person shall allow a person who is younger than eighteen (18) years of age to enter or be on the premises of a sexually oriented business at any time the sexually oriented business is open for business.

(B) It shall be the duty of the business licensee and/or operator of each sexually oriented business to ensure that an attendant is stationed at each public entrance at all times during regular business hours. It shall be the duty of the attendant to prohibit any person under the age of eighteen (18) years from entering the sexually oriented business. It shall be a rebuttable presumption that a person knew a person was under the age of eighteen (18) unless the attendant asked for and was furnished:

1. a valid operator's, commercial operator's, or chauffeur's driver's license issued by any state reflecting that such person is eighteen (18) years of age or older; or
2. a valid personal identification certificate issued by any state reflecting that such person is eighteen (18) years of age or older.

(C) It shall be unlawful for any person under the age of eighteen (18) years to misrepresent such person's age for the purpose of entering the premises of a sexually oriented business at any time the sexually oriented business is open for business.

(D) A person convicted of the violation of any provision of this Section shall be subject to the penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

#### **SECTION 14-164. Massages or Baths.**

It shall be unlawful for any business operating as a sexually oriented business to offer the services of a massage salon, massage parlor, or any similar type business where any physical contact with the recipient of such services is provided by a person of the opposite sex, or where any physical contact with the recipient of such services constitutes "specified sexual activities," regardless of the gender of the recipient or the provider of the service. A person convicted of the violation of any provision of this Section shall be subject to the penalties as set out in Section 1-9 of the Fort Smith Municipal Code.

#### **SECTION 14-165. Hours of Operation.**

No sexually oriented business, except for an adult motel, may remain open at any time between the hours of five o'clock (5:00) a.m. and eleven o'clock (11:00) a.m.

#### **SECTION 14-166. Exemptions.**

It is a defense to prosecution under this division that a person appearing in a state of nudity or semi-nudity did so in a modeling class operated:

1. by a proprietary school, licensed by the State of Arkansas, a college, junior college, or university supported entirely or partly by taxation;
2. by a private college or university that maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation.

#### **SECTION 14-167. Notices.**

(A) Any notice required or permitted to be given by the Chief of Police or any other City office, division, department, or other agency under this division to any applicant, licensee

operator or owner of a sexually oriented business, must be given by certified United States mail, postage prepaid, return receipt requested, addressed to the most recent address as specified in the application for the license, or in any subsequent notice of address change that has been received by the Chief of Police. Notices mailed as above shall be deemed given upon their receipt in the United States mail. In the event that any notice given by mail is returned by the postal service, the Chief of Police shall cause it to be posted at the principal entrance to the establishment, and notice will be considered received upon the date of such posting.

(B) A license may designate an agent for service and notify the Chief of Police of the identity and address of the agent for service. In such event, notices are subject to the requirement of Subsection (A) above, except that notice shall be made at the address of the designated agent for service.

(C) Any notice required or permitted to be given to the Chief of Police by any person under this division shall not be deemed given until and unless it is received in the Office of the Chief of Police.

(D) It shall be the duty of each owner who is designated on the license application and each operator to furnish notice to the Chief of Police in writing of any change of residence or mailing address.

#### **Section 14-168. Injunction.**

A person who operates, or causes to be operated, a sexually oriented business without a valid business license, or a business shown by clear and convincing evidence to be engaging in a regular pattern or practice of violations of this division, is subject to a suit for injunction as well as prosecution for criminal violations. Each day a sexually oriented business so operates, or each day a person so acts in violation of a provision of this division, is to be considered a separate offense or violation.

**SECTION 3: SEPARABILITY.**

If any section, subsection, or clause of this ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections, and clauses shall not be affected thereby.

**SECTION 4: EMERGENCY CLAUSE.**

It is hereby found and declared by the Board of Directors that an emergency situation exists with reference to those matters set forth herein, and that passage and immediate effect of this ordinance is necessary for the preservation of the health, safety, and welfare of the inhabitants of the City. This ordinance shall be of full force and effect upon and after the date of passage.

This Ordinance adopted this 15<sup>th</sup> day of May, 2012.

APPROVED:

A handwritten signature in blue ink, appearing to read "Sandy Sanders", written over a horizontal line.

Mayor

ATTEST:

A handwritten signature in black ink, appearing to read "Sherri Gadd", written over a horizontal line.

City Clerk

APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to read "Wynne", written over a horizontal line.

City Attorney

Publish 1 time